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MEMORANDUM FOR: Chairman, Headquarters Board of Survey

SUBJECT: Pecuniary Liability Policy Study

OGC REVIEW COMPLETED

1. The recent communications from the [redacted] station have raised anew aspects of the responsibilities of Agency employees for the safekeeping of Government property, and the liability of the employee when property in his custody is damaged or lost. This matter has been particularly troublesome in connection with motor vehicle accidents. Accordingly, a review has been undertaken by the Office of General Counsel to identify and restate underlying legal concepts. 25X1A 25X1A

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3. The main difficulty seems to have arisen in the interpretation of the foregoing provisions. They should be understood and interpreted to require an employee to use the care which a reasonable and careful individual ought to use considering the particular situation facing the employee and the nature of the property. The amount of care that a reasonable and careful person would use varies as the factual situation varies. To make this proposition less abstract and more readily applicable to specific cases, it is appropriate and helpful to refer to the law of bailments.

4. The law of bailments provides an exposition of rights and duties between the owner of personal property and the individual who has temporary custody thereof. The responsibility and duty of care for the property of the custodian (bailee) varies in degree depending on the purpose underlying the bailment. It is a rule that is well-established both generally and in the Federal law that where property comes into the hands of the bailee-custodian for his sole benefit, the bailor-owner may expect from the bailee that the property loaned will be given a very high degree of care, and that even a slight deviation from this duty (or as is sometimes said, a slight amount of negligence) will make the bailee liable to the bailor; Dobie, Bailments, sec.40. Where the property is transferred and the bailor-owner alone obtains a benefit from the arrangement, the bailee is liable for damage to the property in his possession only if he deviates very greatly from the standard of a reasonable

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and careful person (or as is sometimes said, if gross negligence is attributable to him): Dobie, Bailments, sec. 29. Where both parties realize a substantial, and not merely an incidental, benefit from the transaction, the bailee must exercise a greater degree of care than that called for when he derived no benefit from the bailment, and he will be liable to the bailor if his lack of care amounts to what is sometimes described as ordinary or simple negligence: Dobie, Bailments, sec. 53.

5. The Agency regulations form a part of the employment contract of each employee and he is deemed to have assented to them at the time he becomes an employee. The Office of General Counsel has advised in an earlier opinion on this subject [redacted] 12 June 1956) that the Agency regulations quoted above provide a legally-adequate basis for charging an employee with knowledge of their content in connection with vehicle accidents and binding the employee thereby. Our earlier opinion also confirmed that an Agency head has an inherent authority to make regulations, not inconsistent with law, for the conduct of the affairs of his agency. We believe that the regulations under consideration here are not inconsistent with law, and as we read them we do not detect any expression of intention to modify or reject the general rules of bailment described above. There is no Federal statute addressed to all government employees which warns them to observe any particular standard of care for property entrusted to them at the risk of suffering a stipulated penalty. The Federal Tort Claims Act, 60 Stat. 842, 28 U.S.C. 1346, 2671 et seq., does not deal specifically with liability as between the Government and its employees, but was enacted for the purpose of giving an aggrieved third party a cause of action against the Government, the employer, which did not exist theretofore because of the Government's immunity to suit without its consent.

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6. [redacted] 24 April 1958, the most recent reference to raise this general subject, inquires as to the legality of an Agency standard imposing, in some cases, a higher duty of care upon employees than established by the foregoing general rules. Specifically, it asks if an Agency employee may be held pecuniarily liable for damage to a Government vehicle being used for strictly official purposes by an authorized user who damages the vehicle through his ordinary negligence. This, of course, is an example of a bailment solely for the benefit of the bailor.

7. We can find support in opinions of the Comptroller General for an agency head imposing a more exacting standard than that laid down in the general law of bailments. The leading case is 25 Comp. Gen. 299 (1945), and in answer to our very recent inquiry at the General Accounting Office we have ascertained that that opinion is considered to be in full force at present and has not been modified, overruled or distinguished. That case did not relate to a motor vehicle accident, but rather to the ordinary negligence of a surveyor who caused steps to be built beyond the line of the Government's property and trespassing on

adjoining private property. The decision was a refusal to permit withholding from his salary deductions in a retirement fund to cover the cost of removing the steps in the absence of specific administrative regulations issued pursuant to law providing for the assessment of charges against employees under such circumstances. There are very few published Comptroller General decisions on this subject, and the foregoing case appears to be a somewhat inadequate foundation for a general rule that would bind an employee to observe administrative regulations at his peril.

8. Our further investigations have ascertained, however, that neither the General Accounting Office nor the Department of Justice have been called upon by other Government agencies (except, possibly, by the armed forces who have unique statutory authority in this connection; e.g., 10 U.S.C. 2772, 4832, 4835, 4837) to attempt to enforce pecuniary liability claims against employees in cases where Government property has been damaged by simple, rather than gross, negligence of an employee. In fact, claims by government agencies, alleging employee negligence in any degree, do not seem to have been presented to those agencies so as to bring them to the attention of officials who normally would be responsible for acting upon such cases. Moreover, a review of the opinions of the Court of Claims from 1950 to date has failed to disclose any cases in which a government employee or ex-employee has sought to recover from the Government where his salary or other monies owed him had been withheld because of his alleged negligence. Finally, it must be recognized that there are implications in the case of U.S. v. Gilman, 347 U.S. 507, 74 S.Ct. 695, decided by the Supreme Court in 1954, that a Government employee, perhaps, may not be held pecuniarily liable even if he is grossly negligent in handling Government property, in the absence of a specific statutory declaration by the Congress manifesting its intention to create such a liability. While the General Accounting Office does not yet appear willing to subscribe to this last view, and it seems not to have been tested in a court case since the Gilman decision, this possibility should not be ignored.

9. The Gilman case involved a suit by a private third party against the Government due to damage caused the plaintiff's automobile by the ordinary negligence of a government employee driving an official vehicle. The Government filed a complaint asking if it should be held liable to plaintiff that it obtain indemnity in the same amount from its employee. The Federal District Court agreed, but was overruled by the Circuit Court of Appeals in a split decision. The Supreme Court unanimously affirmed the Circuit Court of Appeals, and expressed its view of the philosphy underlying the Federal Tort Claims Act. It said, in part:

> "The Tort Claims Act does not touch the liability of the (Government's) employees except in one respect: ... it makes the judgment against the United States 'a complete bar' to any action by the claimant against the employee. ... The relations between the United States and its employees have presented a myriad of

problems with which the Congress over the years has dealt. ...The right of the employer to sue the employee is a form of discipline. ...the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. ...

"The financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. ... Perhaps the losses suffered are so great that government employees should be required to carry part of the burden. Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity the petitioner now asks us to write into the Tort Claims Act. ...

"The claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy which in most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them."

(p. 509-513)

10. On this aspect of the problem, we conclude therefore, that an Agency regulation requiring an employee to compensate the Government for the damage to an official vehicle caused by his simple negligence occurring in the course of carrying out his strictly official duties would be of such dubious legality that we would strongly recommend against such an issuance. In view of the Comptroller General cases, however, we do not find it necessary at this time to advise against assessing pecuniary liability in the case of gross negligence if the Agency desires to reaffirm that policy. The courts, the Comptroller General and the Attorney General are unanimous in the view that in the absence of a specific statutory authority general debts due the United States by its employees may not be set off against current salary payments without their consent but may only be recovered out of money owed the employee at the time of his separation from government service: Smith v. Jackson, 246 U.S. 388, 38 S.Ct. 353 (1918); 29 Comp.Gen. 99; 40 Op. Att. Gen. 36.

11. The second question posed by [redacted] relates to the legality of the assessment of pecuniary liability against an Agency employee who is ordinarily negligent in damaging a government vehicle in a situation involving his "authorized personal use" of the property. Authorized personal use is a concept which has developed in connection with so-called [redacted]

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cover the actual damage incurred, analogizing the situation to one in which the employee has obtained an $100. deductible collision insurance policy protecting his personal vehicle. The argument could be made that the $100. figure is a penalty and hence illegal. If it were necessary to decide this point, we would tend to believe that such a figure would not represent an illegal penalty for the reason that it has a direct relation to and would be no greater than the actual damages. This point, however, may or may not be reached depending on the response to a question which must first be answered regarding the nature of the bailor-bailee relationship created in an authorized personal use case.

12. Reverting to the preceding discussion of basic principles, we think that the question which must be settled first is: --does this situation involve a bailment solely for the benefit of the Government, in which case liability will not exist short of gross negligence on the part of the employee, or does it involve a mutual benefit bailment wherein the bailee in possession of the property will be liable in the event his ordinary negligence causes the damage incurred? If the former is the case, it would follow as a matter of law that the employee could not be charged any amount to recompense the Government. If the latter is the case, the employee could be held liable for the entire amount, and hence for a lesser portion thereof up to $100.

13. The determination to be made in this situation is one of fact rather than law. It should be made on an analysis of all the factual circumstances having a connection with each bailor-bailee relationship established, and therefore it may be impossible to prescribe one general rule to cover all the varieties of [redacted] vehicles maintained throughout the world. It may be possible to treat true quasi-personal vehicles as a class and semi [redacted] hicles as a second class, and it would not be an unreasonable and arbitrary exercise of discretion for an agency head to make class determinations as long as the individual cases grouped in each class are fairly homogeneous. We believe, however, that [redacted] vehicle that is part of a station motor pool by day and [redacted] at night to relieve the Agency of its garaging and protection and whose cover can, if necessary, be broken to disclose Government ownership may be quite different from [redacted] which is seldom if ever used as a pool vehicle.

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14. Accordingly, we would advise the Headquarters Board of Survey that a determination should be made as to the nature of the bailment situations out of which this problem has arisen, and if it is concluded that a mutual benefit bailment exists, it is our belief that the "$100. deductible" rule might legally be adopted as Agency policy. However, if the bailment is found to be solely for the Government's benefit, the "gross negligence" rule would be more appropriate. We suggest that the policy adopted be announced by a clarified regulatory issuance.

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Assistant General Counsel

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A OGC [redacted] (19 May 58)